

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2000

4 (Argued: November 28, 2000

Decided: December 06, 2000)

5 Docket No. 00-7460

6 WILLIAM BROOKS, as Parent and Natural Guardian of Matthew Brooks, a Minor,

7 *Plaintiff-Appellant,*

8 - v.

9 OUTBOARD MARINE CORPORATION,

10 *Defendant-Appellee.*
11

12 Before: VAN GRAAFEILAND and KATZMANN, *Circuit Judges*, and JONES,¹ *District Judge*.

13 The plaintiff William Brooks appeals from a March 22, 2000 order of the United States District
14 Court for the Western District of New York (Skretny, *J.*), granting summary judgment to the defendant
15 in this case arising from the amputation of Matthew Brooks' hand by an outboard motor manufactured by
16 the defendant Outboard Marine Corporation.

17 Affirmed.

18 A. BRUCE ROZAS, Rozas & Rozas, Mamou, Louisiana
19 (Lawrence J. Strauss, Nicholas, Perot & Strauss, Akron, New
20 York, *on the brief*), *for Appellant*.

¹ The Honorable Barbara S. Jones, United States District Court for the Southern District of New York, sitting by designation.

1 RICHARD A. CHESLEY, Jones, Day, Reavis &
2 Pogue, Chicago, Illinois (Michael B. Willian,
3 *on the brief*, William D. Christ, Phillips, Lytle, Hitchcock, Blaine & Huber, Buffalo, New York, *on the*
4 *brief*), *for Appellee*.

5 PER CURIAM:

6 BACKGROUND

7 A tragic accident occurred on June 25, 1996. Theresa Brooks rented a boat from Harry's Bait
8 Shop in Waterport, New York for her 14-year-old son Matthew and his 15-year-old friend Andrew
9 May. Neither boy was old enough to rent the boat or in possession of any certification or license which
10 would allow him to legally do so. After renting the boat, Mrs. Brooks sent the two boys off to fish
11 unsupervised. The owner of the shop also understood that the boys would use the boat unsupervised.
12 Matthew's fishing line soon became entangled with the propeller. The motor was still running but was
13 in neutral so that the propeller itself was not spinning. Matthew wrapped the line around his right hand
14 to get a better grip, and reached into the water to attempt to untangle it. At that time, perhaps due to
15 Matthew's shirt catching on the gearshift, the motor engaged in reverse and Matthew's hand was pulled
16 into the now-spinning propeller and amputated.

17 William Brooks brought suit on behalf of his son Matthew against the owner of Harry's Bait
18 Shop, Andrew May, and Outboard Marine Corporation ("OMC"), the manufacturer of the motor.
19 Andrew May and Harry's settled with the plaintiff, and the suit continued against OMC under two
20 theories: that the motor was defective and unreasonably dangerous due to the lack of a propeller guard
21 and a defective gearshift mechanism which allowed only minimal pressure to cause the engine to shift
22 into gear.

1 In February 1998, OMC deposed the plaintiff's expert witness. After the close of discovery
2 on March 31, 1998, the plaintiff requested permission to extend discovery in order to obtain a new
3 expert witness. In the meantime, OMC filed a motion for summary judgment, arguing that the plaintiff's
4 current expert should be precluded from testifying and that summary judgment was proper on the
5 plaintiff's two theories of liability. The motion was referred to the magistrate judge. The plaintiff then
6 filed a curriculum vitae and one-page report of a new expert witness, Robert A. Warren. Mr.
7 Warren's report concluded that either a propeller guard or an emergency motor shut off device, known
8 as a "kill switch,"² could have prevented the accident or lessened its severity. After OMC deposed
9 Mr. Warren in June 1998, the plaintiff then filed a response to the pending summary judgment motion.
10 At oral argument, plaintiff's counsel abandoned the "shift mechanism" and "propeller guard" claims,
11 conceding that the only claim on which he would proceed was the new "kill switch" claim. The
12 magistrate recommended denying OMC's motion for summary judgment, finding that it was
13 "premature" because the defendant had not properly responded to the plaintiff's new design defect
14 theory. See Brooks v. Outboard Marine Corp., 47 F. Supp. 2d 380, 388 (W.D.N.Y. 1999). In
15 addition, the magistrate found it premature to rule on the admissibility of Mr. Warren's testimony, noting
16 that such rulings are usually made on a more complete record. See id. The district court adopted the
17 magistrate's recommendation.

18 Subsequently Mr. Warren produced a videotape demonstrating how a kill switch works, and

² A "kill switch" operates by means of a lanyard attached to both the motor and the operator of the boat; when the operator moves more than the length of the lanyard from the motor, as, for example, when the operator is thrown out of the boat, the kill switch automatically shuts off the engine.

1 also submitted to a second deposition. OMC then filed a second motion, moving pursuant to
2 Fed.R.Evid. 104 for a ruling that Mr. Warren be precluded from testifying and pursuant to
3 Fed.R.Civ.P. 56 for summary judgment. OMC argued that Mr. Warren was unsuited by education or
4 experience to testify about the kind of boat and engine in question, and also that his conclusion that the
5 kill switch would have activated and prevented or lessened the severity of the accident was untested
6 and unsupported by any examination of the actual boat or motor, or the interview of any witnesses.
7 OMC also argued that it was entitled to summary judgment because of certain alleged admissions
8 regarding the kill switch made by Mr. Warren in his deposition.

9 The magistrate agreed that Mr. Warren's opinion regarding the kill switch was "unreliable and
10 speculative, and would not assist the jury in its determination of the facts at issue in this case." The
11 magistrate noted inter alia that Mr. Warren had not performed any tests on the actual boat or engine
12 involved in the accident, conducted any interviews with any witnesses, or conducted "any actual testing
13 to determine whether the use of a lanyard-activated kill switch would have disengaged the engine under
14 the circumstances." As a result, the magistrate recommended precluding Mr. Warren from testifying.
15 Without this testimony, the magistrate found that the plaintiff could not make out a prima facie case of a
16 design defect and recommended granting summary judgment. The district court adopted this
17 recommendation over the plaintiff's objections. This appeal followed.

18 19 DISCUSSION

20 We review a grant of summary judgment de novo. See Bonide Products, Inc. v. Cahill, 223
21 F.3d 141, 143 (2d Cir. 2000) (per curiam). Brooks makes three principal arguments on appeal. First,

1 he argues that the Supreme Court’s recent decision in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S.
2 137 (1999), requires the party challenging the admissibility of its opponent’s expert witness to first use
3 its own expert to call the challenged expert’s testimony “sufficiently into question.” Id. at 149. Only
4 then, contends the plaintiff, can the district court analyze the admissibility of the testimony of the expert
5 witness. This argument is without merit. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S.
6 579 (1993), the Supreme Court instructed that the Federal Rules of Evidence require the trial court to
7 “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” Id. at
8 589. The subsequent decision in Kumho Tire makes clear that this gate-keeping function applies not
9 just to scientific expert testimony as discussed in Daubert, but also to testimony based on “‘technical’
10 and ‘other specialized’ knowledge.” Kumho Tire, 526 U.S. at 141 (quoting Fed.R.Evid. 702). The
11 plaintiff’s argument that this gate-keeping role disappears when a proposed expert witness is not
12 challenged by an opposing expert witness thus runs counter to the thrust of Daubert and Kumho Tire.
13 Nowhere in either opinion is there language suggesting that testimony could only be “called sufficiently
14 into question” by a rebuttal expert.

15 Brooks also argues that the lower court erred in finding that Mr. Warren’s testimony was
16 speculative and unreliable. Reviewing this decision under an abuse of discretion standard, see Kumho
17 Tire, 526 U.S. at 142 (citing General Electric Co. v. Joiner, 522 U.S. 136, 143 (1997)), it is evident
18 that the district court acted well within its discretion. To note but a few shortcomings of Mr. Warren’s
19 testimony: he had never seen the actual boat or motor either in person or in photographs, had never
20 spoken to either of the boys involved in the accident, was unaware of the dimensions of the boat and
21 the placement of the seats in relation to the motor, did not know precisely what happened and where

1 the boys were positioned in the time immediately preceding the accident, and had never attempted to
2 reconstruct the accident and test his theory. The failure to test a theory of causation can justify a trial
3 court's exclusion of the expert's testimony. See Clark v. Takata Corp., 192 F.3d 750, 758-59 (7th
4 Cir. 1999); Dancy v. Hyster Co., 127 F.3d 649, 652 (8th Cir. 1997); Cook v. American Steamship
5 Co., 53 F.3d 733, 739-40 (6th Cir. 1995), abrogated on other grounds, Joiner, 522 U.S. 136. On
6 appeal, the plaintiff appears to suggest that the videotape represents a test of Mr. Warren's theory, but
7 Mr. Warren made it clear at his second deposition that the videotape was not meant to simulate the
8 actual accident but merely was a "demonstration of how a kill switch would work." As such, it lends
9 no reliability to Mr. Warren's theory.

10 CONCLUSION

11 Having determined that the district court acted within its discretion in excluding Mr. Warren's
12 testimony, the plaintiff has no evidence in the record to support his theory that the motor had a design
13 defect which caused the accident or increased its severity. As a result, summary judgment was
14 properly granted. The judgment of the district court is therefore affirmed.